Supreme Court, U.S.
FILED
JUN 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

86 1944 (2.)
No. 86-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SOUNG O. KWOUN, *et al.*,

Petitioners,

vs.

SOUTHEAST MISSOURI PROFESSIONAL STANDARDS REVIEW ORGANIZATION, *et al.*,

Respondents.

APPENDIX OF OPINIONS AND STATUTES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-2379

Soung O. Kwoun, et al.,

Appellees,

v.

Southeast Missouri Professional
Standards Review Organization, et al.,

Appellants.

No. 86-1502
No. 86-1838

Soung O. Kwoun, et al.,

Appellants,

v.

Southeast Missouri Professional
Standards Review Organization, et al.,

Appellees.

Submitted: November 10, 1986
Filed: February 4, 1987

Appeals from the United States District Court for the Eastern District of Missouri

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Before HEANEY and BOWMAN, Circuit Judges, and ARNOLD,* District Judge.

ARNOLD, District Judge

The U.S. Department of Health and Human Services (HHS) oversees Medicare payments to doctors and hospitals. See 42 U.S.C. § 902, § 1395kk(a). As part of its oversight responsibilities, HHS is authorized to exclude doctors and hospitals from eligibility for Medicare payments if services have been provided that are substantially in excess of need or fail to meet professional standards. See 42 U.S.C. § 1395y(d)(1)(c). To determine whether to exclude doctors and hospitals

*/ The HONORABLE MORRIS S. ARNOLD, United States District Judge for the Western District of Arkansas, sitting by designation.

from eligibility, HHS uses reports submitted by regional and statewide peer review organizations. See 42 U.S.C. § 1395y(g). The HHS office with the specific responsibility for making such determinations is called the Health Care Financing Administration (HCFA).

In December, 1978, HCFA notified the regional peer review group for southeastern Missouri[1] that the patient discharge rates in that region indicated the possibility of abuses in claims for Medicare payments. The regional peer review group began an investigation that eventually focused on the Poplar Bluff Hospital and the doctors with admitting privileges there. Soung Kwoun is one of those doc-

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[1] The regional peer review group is known as the Southeast Missouri Professional Standards Review Organization (SEMO).

tors.[2] Following the investigation, the regional peer review group recommended to the statewide peer review group[3] that the hospital change some of its procedures and that Dr. Kwoun be excluded from eligibility for Medicare payments for ten years. The statewide peer review group adopted the recommendation of the regional peer review group and then transmitted the report and recommendations to HCFA in March, 1980.

In September, 1980, HCFA notified Dr. Kwoun of the recommendation and advised him of his right to oppose it. After an informal hearing in December, 1980, and additional consideration of the

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[2] The other plaintiffs are corporate entities in which Dr. Kwoun has an interest.

[3] The statewide peer review group is known as the Missouri Statewide Professional Standards Review Council.

peer review group report and Dr. kwoun's responses to it, HCFA adopted the recommendation. In September, 1981, HCFA officially excluded Dr. Kwoun from eligibility for Medicare payments for a period of ten years. Dr. Kwoun then asked for a formal hearing before an administrative law judge. The administrative law judge reversed the exclusion, citing procedural and substantive errors by HCFA, especially the reliance of HCFA on informal discussions with members of the regional peer review group as the basis for excluding Dr. Kwoun. The administrative law judge then ordered Dr. Kwoun's reinstatement to eligibility for Medicare payments.

Dr. Kwoun subsequently brought this action against certain HCFA employees, members of the regional and statewide

peer review groups, two state officials involved in state proceedings brought against Dr. Kwoun as a result of the recommendation of the peer review group, and the insurance company that administers the Medicare payments program under contract with the government.[4] Dr. Kwoun claimed that the HCFA employees[5] deprived him of certain property and liberty interests without due process and subjected him to malicious prosecution and extreme and outrageous conduct. He asserted that the members of the regional

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[4] The insurance company was dismissed on grounds other than those involved in these appeals; its dismissal was not appealed.

[5] The HCFA employees are collectively referred to by the parties as the federal defendants.

and statewide peer review groups[6] and the state officials deprived him of equal rights under the law to make and enforce contracts and conspired to deprive him of the equal protection of the laws. His complaint against the peer review group members and the state officials also contained counts for malicious prosecution and extreme and outrageous conduct. Finally, Dr. Kwoun claimed that the state officials deprived him of certain property and liberty interests without due process.

The HCFA employees moved for summary judgment on the basis of absolute immunity. The district court denied the motion. Three of the HCFA employees ap-

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[6] The members of the regional and statewide peer review groups are collectively referred to by the parties as the SEMO defendants.

peal the denial of absolute immunity.[7] While the HCFA employees' appeal was pending, the district court dismissed, sua sponte, the case against all defendants on the ground of qualified immunity. The plaintiffs appeal these dismissals. We affirm the orders of dismissal of all defendants but do so on the ground of absolute rather than qualified immunity.

I.

We turn first to the federal defendants -- the HCFA employees. Defendant Frank Kram is the HCFA employee who reviewed the peer review group report and accepted its recommendation to exclude Dr. Kwoun from eligibility for Medicare reimbursement. Defendant Don Nicholson

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[7] A fourth HCFA employee was named as a defendant but did not appeal.

is the HCFA employee who signed the notice of proposed exclusion; defendant Ralph Howard is the HCFA employee who signed the final decision excluding Dr. Kwoun. Apparently the acts of defendant Kram are the primary focus of attention; the complaint is cryptic on this point, and the only specific allegation against defendants Nicholson and Howard in the plaintiffs' brief is that their conduct "was in a line with the earlier conduct of Kram ... and furthered and reinforced the previous lack of arms' length dealing."

While the regional peer review group was investigating Dr. Kwoun, but before it submitted its report to HCFA, defendant Kram apparently met with the members of the investigating committee in the offices of the statewide peer review

group and discussed the investigation of Dr. Kwoun. The administrative law judge found that the report of the peer review group did not meet the substantive due process requirements set forth in the applicable policy manual and federal regulations. He found in addition that Dr. Kwoun had been denied substantive due process because defendant Kram's adoption of the recommendation to exclude him from eligibility for Medicare payments was based at least in part on defendant Kram's discussions with members of the regional peer review group before the report was issued and not on the report itself.[8]

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[8] Because HCFA failed to follow certain procedural requirements relating to notice to Dr. Kwoun in December, 1979, of the proposed exclusion, the federal defendants are also charged with denying Dr. Kwoun procedural due process. These allegations are apparently included only

Barr v. Matteo, 360 U.S. 564, 575 (1959) (plurality opinion), grants absolute immunity from common-law tort claims to federal officials acting "within the outer perimeter of [their] line of duty." Our court has described absolute immunity from common-law torts as applying to acts connected "'... more or less ... with the general matters committed by law to the officer's control or supervision, and not ... manifestly or palpably beyond his authority.'" Bushman v. Seiler, 755 F.2d 653, 655 (8th Cir. 1985), quoting Norton v. McShane, 332 F.2d 855, 859 (5th Cir. 1964), cert.

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as a basis for the constitutional claims against them. In addition, the federal defendants are charged with various misconduct during the hearing before the administrative law judge. These charges are also apparently included only as a basis for the constitutional claims against them.

denied, 380 U.S. 981 (1965). The plaintiffs contend that defendant Kram (and by extension defendants Nicholson and Howard, those officials having relied on defendant Kram's recommendation) acted outside the scope of his authority because defendant Kram was involved in discussions with members of the regional peer review group before its report was issued.

The first mention of HCFA in the regulations governing the imposition of exclusion sanctions under the Medicare program provides that a peer review group is to submit a report on violations to HCFA after an investigation of possible violations. See 42 C.F.R. § 474.3(b), § 474.8(a). Following submission of a peer review group report, HCFA is to determine whether a violation has occurred and is

to provide notice to the alleged violator of the proposed exclusion. See 42 C.F.R. § 474.10(a), § 474.10(c). There is no mention of HCFA involvement prior to the issuance of a peer review group report.

On the other hand, there is no explicit prohibition of such involvement either. Furthermore, HHS is charged with the duty of "promoting the effective, efficient, and economical delivery of health care services, and of promoting the quality of services of the type for which [Medicare] payment may be made." See 42 U.S.C. § 1395y(g). HHS also has the authority to contract with peer review groups in order to carry out its duties. Id. All parties agree that it was HCFA that notified the regional peer review group of data indicating possible Medicare abuses. It seems apparent,

then, that any involvement of HCFA employees in a peer review group investigation after that notification would be within the scope of their authority.

Even if acceptance of the recommendation to exclude was based on improper factors (such as consideration of matters outside the peer review group report), that does not make the earlier actions of the HCFA employees outside the scope of their authority; it merely makes the acceptance of the recommendation incorrect. The federal defendants are therefore entitled to absolute immunity from common-law tort claims.

A more difficult question is how to categorize the purpose of the duties of the HCFA employees in the context of the process for imposing exclusion sanctions on possible violators of the rules gov-

erning Medicare payments.[9] The courts have recognized that the reasons for granting absolute immunity to federal officials from common-law tort claims -- to protect them "in the execution of their federal statutory duties from criminal or civil actions based on state law," Butz v. Economou, 438 U.S. 478, 489 (1978) -- do not apply to claims based on violations of constitutional law. Id. at 495.

In most cases, "federal executive officials exercising discretion are entitled only to ... qualified immunity"

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9 - The dissent would remand to the district court for a determination of which federal defendants' duties can be characterized as prosecutorial or adjudicative. Affidavits and exhibits already submitted by the federal defendants to the district court, however, establish that each one had the authority to "initiate or continue a proceeding subject to agency adjudication." Butz v. Economou, 438 U.S. 478, 516 (1978).

from constitutional claims. Id. at 507. Absolute immunity from constitutional claims is to be granted only in "those exceptional situations where it is demonstrated that [such] immunity is essential for the conduct of the public business." Id. The determination of when such exceptional situations exist is a "'functional'" one, Harlow v. Fitzgerald, 457 U.S. 800, 810 (1982), and "[t]he burden of justifying absolute immunity rests on the official asserting the claim." Id. at 812.

"[J]udicial, prosecutorial, and legislative functions require absolute immunity," id. at 811, and therefore "agency officials performing certain functions analogous to those of a prose-

cutor"[10] are entitled to absolute immunity. Butz, 438 U.S. at 515. The Supreme Court has held only that in "initiating a prosecution and in presenting the [case against the defendant]"--those prosecutorial functions "intimately associated with the judicial phase" of his duties -- is a prosecutor entitled to absolute immunity. Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976). Whether a prosecutor acting as "an administrator or [an] investigative official rather than

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[10] "The decision to initiate administrative proceedings against an individual ... is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution. An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought." Butz, 438 U.S. at 515. "[T]hose officials who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication are entitled to absolute immunity ... for their parts in that decision." Id. at 516.

... an advocate" is entitled to absolute immunity is a question that the Court has expressly reserved. Id.

The federal defendants argue that the process of deciding whether to impose exclusion sanctions on a person under the Medicare program is analogous to an agency decision on whether to initiate administrative proceedings against a person in order to suspend or revoke his federal registration as a commodities futures merchant, see Butz, 438 U.S. at 481, or in order to impose professional disciplinary sanctions, see Austin Municipal Securities, Inc. v. National Association of Securities Dealers, Inc., 757 F.2d 676, 689 (5th Cir. 1985). They therefore argue that actions taken prior to the formal hearing before the administrative law judge (defendant Kram's al-

legedly improper consultation with members of the regional peer review group in January, 1980, and the failure to give adequate notice to Dr. Kwoun in December, 1979, of the fact that he was being considered for exclusion sanctions) occurred in the context of essentially advocatory prosecutorial duties -- "deciding whether a proceeding should be brought and what sanctions should be sought," Butz, 438 U.S. at 515, against "a specific target," Gray v. Bell, 712 F.2d 490, 501 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984).

We agree. The statutes and regulations governing the exclusion sanctions process obviously anticipate the possibility of a formal adjudicative hearing before an administrative law judge designated by the appeals counsel of HHS.

See, 42 U.S.C. § 1395y(d)(3) and 42 C.F.R. § 474.10(g)(1), § 405.1533. The hearing is de novo, and HCFA has the burden of proof. Appeal of the decision of the administrative law judge is to the appeals counsel of HHS. See 42 C.F.R. § 405.1561. Judicial review of the appeals council decision is a possibility. See 42 U.S.C. § 1395y(d)(3).

The federal defendants further argue that their alleged misconduct during the formal hearing before the administrative law judge was clearly advocatory. We agree. An agency official's presentation of evidence in an agency hearing is protected for the same reasons that a prosecutor's presentation of evidence before a court is protected. Butz, 438 U.S. at 517.

Because the actions of the federal defendants at all relevant times were prosecutorial in nature, those defendants are entitled to absolute immunity from constitutional claims. The dismissal orders of the district court as to the federal defendants are therefore affirmed.

II.

The SEMO defendants include the regional peer review corporate body, the statewide peer review corporate body, the directors and officers of both groups, the regional peer review group representative to the statewide peer review group, the members of the regional peer review group investigation oversight committee, the Poplar Bluff Hospital review coordinator for the regional peer review group, the physician advisers to the

Poplar Bluff Hospital appointed by the regional peer review group, and the members of the regional peer review group investigating team specifically assigned to Dr. Kwoun.[11] These defendants argue that because they were participating in a review process established and governed by federal law, they are federal actors

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[11] The complaint does not specify whether the individual SEMO defendants are sued in their individual or their official capacity. However, our conclusions about the nature of the exclusion sanctions process and the role of peer review groups within that process make that question irrelevant. In addition, it turns out that some of the individual SEMO defendants either were not associated with the peer review groups at the relevant times, did not participate in the investigation of Dr. Kwoun, or participated only as expert witnesses in the formal hearing before the administrative law judge. Our conclusions about the nature of the exclusion sanctions process and the role of peer review groups within that process make it unnecessary for us to make separate rulings as to the different classes of SEMO defendants.

for the purpose of any analysis of their activities in relation to the investigation of Dr. Kwoun. We agree.

HHS is authorized to contract with peer review groups to carry out its duty to promote "the effective, efficient, and economical delivery of health care services, and [to promote] the quality of services of the type for which [Medicare] payment may be made." See 42 U.S.C. § 1395y(g). Medicare payments may not be made for items or services that are not "reasonable and necessary for the diagnosis or treatment of illness or injury." See 42 US.C. § 1395y(a)(1)(A). When a peer review group does undertake such a contract, the peer review group "must ... review some or all of the professional activities ... of physicians ... in the provision of health care services

and items for which [Medicare] payment may be made ... for the purpose of determining whether ... [those] services and items are ... reasonable and medically necessary and whether such services and items are not allowable under ... section 1395y." See 42 U.S.C. § 1320c-3(a)(1)(A). The peer review group is to determine, on the basis of its review, whether Medicare payments are to be made for the services reviewed. See 42 U.S.C. § 1320c-3(a)(2). The determination of the peer review group is conclusive as to Medicare payments unless it is changed by reconsideration of the peer review group.[12] See 42 U.S.C. §1320c-3(a)

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[12] Once HHS acts on the recommendation of the peer review group, a formal hearing before an administrative law judge is available for review of the action taken by HHS, with eventual judicial review also available. See 42 U.S.C. § 1395y(d)(3).

(2)(C). In other words, HHS essentially uses the peer review group as a consultant that recommends whether or not a doctor should continue to be eligible for Medicare reimbursements.

Consultants who investigate whether the services provided by doctors are necessary and eligible for Medicare reimbursement have been held to be "governmental agents for immunity purposes." Bushman v. Seiler, 755 F.2d 653, 655 (8th Cir. 1985)(defendant was consultant to insurance company that was Medicare carrier for HHS). See also Gross v. Sederstrom, 429 F.2d 96, 99 (8th Cir. 1970) (defendants were elected committee members who investigated farmer's eligibility for grain program for federal Agricultural Stabilization and Conservation Service; held to be federal officials for

immunity purposes in suit resulting from denial of farmer's application for participation). The SEMO defendants were therefore acting as federal officials for immunity purposes.

As federal officials for the purpose of an analysis of eligibility for immunity, the SEMO defendants are immune from common-law tort claims if their actions were not "'... manifestly or palpably beyond [their] authority.'" Bushman, 755 F.2d at 655, quoting Norton v. McShane, 332 F.2d 855, 859 (5th Cir. 1964), cert. denied, 380 U.S. 981 (1965). The plaintiffs apparently concede that the actions of the SEMO defendants were within the authority given by the statute, since their argument concentrates on the assertion that the SEMO defendants are not federal officials. Furthermore, although

the administrative law judge found that the peer review group report was deficient and even inaccurate in several respects, he made no finding that the SEMO defendants had investigated Dr. Kwoun in any manner not authorized by statute or by their contract with HHS. We hold, therefore, that the SEMO defendants are absolutely immune from the common-law tort claims asserted against them.

The SEMO defendants argue that they are also entitled to immunity from constitutional claims because their actions were essentially prosecutorial in nature. They contend that the peer review groups are analogous to the professional organizations to whom absolute immunity from constitutional claims has been granted when disciplinary actions have resulted

in a lawsuit by the person disciplined. See e.g., Austin Municipal Securities, Inc. v. National Association of Securities Dealers, Inc., 757 F.2d 676, 689 (5th Cir. 1985)(prosecutorial and adjudicative functions of securities dealers' association disciplinary committee); Clulow v. State of Oklahoma, 700 F.2d 1291, 1298 (10th Cir. 1983) (prosecutorial function of bar disciplinary committee); and Simons v. Bellinger, 643 F.2d 774, 782 (D.C. Cir. 1980)(prosecutorial and adjudicative functions of bar committee on unauthorized practice of law). We agree.

Peer review groups that are eligible to contract with HHS must be "composed of a substantial number of the licensed doctors of medicine and osteopathy engaged in the practice of medicine or surgery in

the area and who are representative of the practicing physicians in the area" and must be judged by HHS to be "able ... to perform reviews of the pattern of quality of care in an area of medical practice where actual performance is measured against objective criteria which define acceptable and adequate practice." See 42 U.S.C. § 1320c-1(1)(A), § 1320c-1(2). In conducting reviews under contract with HHS, the peer review groups are to "apply professionally developed norms of care, diagnosis, and treatment based upon typical patterns of practice within the [relevant] geographic area ... taking into consideration national norms where appropriate." See 42 U.S.C. § 1320c-3(6). The norms with respect to treatment for particular illnesses or health conditions are to include "the

types and extent of the health care services which ... are considered within the range of appropriate diagnosis and treatment of such illness[es] or health condition[s], consistent with professionally recognized and accepted patterns of care." See 42 U.S.C. § 1320c-3(a)(6)(A).

In other words, the medical peer review groups are organizations of professionals charged with the task of evaluating the performance of members of that profession. Thus, although medical peer review groups are not associations of professionals supervised by a licensing body, see e.g., Austin Municipal Securities, Inc., 757 F.2d at 680, and Clulow, 700 F.2d at 1297, they are nonetheless very similar to such associations. Furthermore, although medical peer review groups do not control a professional's

ability to practice in all contexts, see e.g., Simons, 643 F.2d at 781 (bar committee has power to disbar attorneys), they do control to some extent a professional's ability to practice in a particular class of cases -- those that involve claims for Medicare reimbursement. See 42 U.S.C. § 1320c-3(a)(2)(C), § 1395y(d)(3)(determination of peer review group on eligibility for Medicare reimbursement is conclusive unless changed by reconsideration of peer review group, formal hearing decision of administrative law judge, decision of appeals council of HHS, or judicial review). Thus medical peer review groups are very similar to bar committees that control whether a lawyer may practice before certain courts. See, e.g., Simons, 643 F.2d at 775.

Absolute immunity from even constitutional claims was granted to the securities dealers' association disciplinary committee in Austin Municipal Securities, Inc., 757 F.2d at 689, and to the bar disciplinary and practice committees in Clulow, 700 F.2d at 1298, and Simons, 643 F.2d at 782. Such immunity was granted because each committee's function shared the characteristics of the judicial process, because an unfavorable recommendation from each committee had the potential of provoking a retaliatory lawsuit, and because the subject of each committee's actions had adequate opportunity to challenge those actions through judicial review. See Austin Municipal Securities, Inc., 757 F.2d at 689, Clulow, 700 F.2d at 1298, and Simons, 643 F.d at 782, all incorpor-

ating the tests specified in Butz v. Economou, 438 U.S. 478, 513 and 515-16 (1978).

We find that the review activities of the medical peer review groups at issue here -- those entrusted to them by Congress so that the Medicare program can function effectively, efficiently, and economically, see 42 U.S.C. § 1395y(g)-- are similar enough to the review activities of the disciplinary and practice committees declared to be immune in the cases discussed above that similar protection should be extended.[13]

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[13] The dissent relies on a statutory provision, 42 U.S.C. § 1320c-6(b), in arguing that the SEMO defendants are entitled only to qualified immunity. Legislative history on this provision, in either its current or previous incarnation, is sparse. The legislative history for the entire peer review statute currently in effect refers to the intent of Congress to exempt peer review reports from coverage under the Freedom of

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Information Act. See H.R. Conf. Rep. 760, 97th Cong., 2d Sess. 443, reprinted in 1982 U.S Code Cong. and Admin. News 781, 1223. This exemption was probably a statement of agreement with the conclusions of the court in Public Citizen Health Research Group v. Department of Health, Education, and Welfare, 668 F.2d 537, 544 (D.C. Cir. 1981), that, for FOIA purposes, peer review groups were not intended to be, do not qualify as, and should not be considered to be government agencies. However, it also supports the conclusion that Congress, unaware that the courts would find some consultants advising government agencies to be federal actors for immunity purposes (as opposed to FOIA purposes), originally considered the members of peer review groups to be private parties and sought to protect them to come extent from civil liability. In order words, the statute was an effort to extend some protection to people who were thought to have none, rather than an attempt to restrict protection already acknowledged to exist. See e.g., S. Rep. 1431, 91st Cong., 2d Sess. 162 (1970)("The amendment provides protection from civil liability for those engaged in required review activities ...")(In reference to an early incarnation of the statute)(emphasis added). Once such consultants were considered federal actors for immunity purposes, of course, they became eligible for absolute immunity because of the prosecutorial or adjudicative function of their duties.

We are not unmindful of the problems that may arise from the extension to medical peer review groups of absolute immunity from both common-law tort claims and constitutional claims. We are convinced, however, that in order for the Medicare program to work effectively, efficiently, and economically, see 42 U.S.C. § 1395y(g), some controls on quality of care must be exercised. We are also convinced that the exercise of controls on quality of care greatly increases the benefits derived from the Medicare program by both the individual Medicare patients and our society as a

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The statutory provision is now superfluous for anyone except a consultant who would not be considered a federal actor for immunity purposes or one, classified as a federal actor for immunity purposes, whose duties would not be considered prosecutorial or adjudicative.

whole. We are further convinced that the only way to ensure both the effectiveness of the peer review system and the willingness of private doctors to participate in it is to insulate them from damage claims that may result from that work. The alternative to the use of private doctors to review medical decisions is the use of agency officials, who are much less likely to possess the expertise to evaluate such medical decisions. The use of agency officials to review medical decisions would almost certainly lead to a far less effective, efficient, and economical Medicare program. In short, we are convinced that absolute immunity is "essential for the conduct of the public business," Butz, 438 U.S. at 507, in this critical health care area. The availability of administrative and judi-

cial review serves as a check against abuse of the power inherent in the peer review system and against mistakes or sloppiness in that system. A further check over the long run is the power of HHS to terminate its contract with any peer review group.[14] See 42 U.S.C. § 1320c-2(c)(6).

We therefore hold that the SEMO defendants are absolutely immune from constitutional claims as well as common-law tort claims. The dismissal orders of the district court as to the SEMO defendants are affirmed.

III.

We turn last to the two state officials involved in state proceedings brought against Dr. Kwoun as a result of

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[14] Such a termination is not subject to judicial review. See 42 U.S.C. § 1320c-2(f).

the recommendation of the peer review groups. Defendant W. F. Montgomery is the deputy director for medical services of the Missouri Department of Social Services; defendant Gary Clark is the executive secretary of the Missouri State Board of Registration for the Healing Arts.

The Missouri Department of Social Services received a copy of the peer review group report that was submitted to HCFA. On the basis of that report, the Missouri Department of Social Services suspended Dr. Kwoun from eligibility for payments under the state Medicaid program. Defendant Montgomery was apparently the state officer who initiated the suspension.

The Missouri State Board of Registration for the Healing Arts -- the state

licensing body for doctors, see Mo. Ann. Stat. § 334.120 (Vernon 1987, which has the power to suspend or revoke a doctor's license, see Mo. Ann. Stat. § 334.100 (Vernon 1987) -- also received a copy of the peer review group report that was submitted to HCFA. On the basis of that report, the Missouri State Board of Registration for the Healing Arts initiated proceedings to suspend or revoke Dr. Kwoun's licence to practice medicine in Missouri. Defendant Clark, as the executive secretary of the board, was apparently the officer who initiated the proceedings for the board. He is considered an administrative officer (rather than a clerical employee). See Mo. Ann. Stat. § 334.123 (Vernon 1987) and Mo. Ann. Stat. § 620.010.15(4) (Vernon 1987).

Defendant Montgomery's suspension of Dr. Kwoun from eligibility for state Medicaid payments is clearly an act that was performed under the discretionary powers of his position; similarly, defendant Clark's act in initiating license suspension/revocation proceedings against Dr Kwoun is clearly an act that was performed under the discretionary powers of his position. Each is therefore immune under Missouri law from the common-law tort claims asserted against him. Kanagawa v. State by and through Freeman, 685 S.W.2d 831, 835 (Mo. 1985) (en banc).

This analysis of absolute immunity from constitutional claims for these state defendants is the same as that applicable to federal defendants. Butz v. Economou, 438 U.S. 478, 504 (1978). We therefore find that each is also

immune from the constitutional claims asserted against him.

The process of deciding whether to impose a state Medicaid exclusion sanction, the process of deciding whether to initiate a license suspension/revocation proceeding, and the process of deciding whether to impose a federal Medicare exclusion sanction are all of a kind. Each is essentially an advocatory prosecutorial function -- "deciding whether a proceeding should be brought and what sanctions should be sought," Butz, 438 U.S. at 515, against "a specific target," Gray v. Bell, 712 F.2d 490, 501 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984). Indeed, the administrative and judicial review available under Missouri law is similar to that available under federal law. See Mo. Ann. Stat. §

621.055.1 (Vernon 1987), Mo. Ann. Stat. § 536.100 (Vernon 1953)(review of exclusion from state Medicaid program); Mo. Ann. Stat. § 334.100.2 and § 334.100.3 (Vernon 1987), Mo. Ann. Stat. § 621.100, § 621.110, and § 621.145 (Vernon 1987), and Mo. Ann. Stat. § 536.100 (Vernon 1953)(review of suspension/revocation of license to practice medicine); and 42 U.S.C. § 2395y (d)(3)(review of exclusion from federal Medicare program).

The orders dismissing the state defendants, along with the orders dismissing the federal defendants and the SEMO defendants, are therefore affirmed.

HEANEY, Circuit Judge, dissenting.

I respectfully dissent. In my view, this Court should not blindly accord absolute immunity to all federal defendants for their alleged violations of Dr. Kwoun's constitutional rights and should not accord absolute immunity to any of the Southeast Missouri Professional Standards Review Organization (SEMO) defendants for their alleged violations of Dr. Kwoun's constitutional rights. I am otherwise in accord with the majority.

The Federal Defendants:

Absolute immunity should not be extended to all of the federal defendants for their alleged constitutional violations at this time because the record does not establish that all of them are necessarily entitled to it. The majority

correctly notes that entitlement to absolute immunity for constitutional violations is governed by Butz v. Economou, 438 U.S. 478 (1978), which holds that "agency officials performing certain functions analogous to those of a prosecutor" are entitled to absolute immunity. Id. at 515. What they neglected to point out is that the burden of establishing absolute immunity rests on those who claim it, see Harlow v. Fitzgerald, 457 U.S. 800, 812 (1982); Butz, 438 U.S. at 506, and that the issue is one of fact to be decided in the first instance by the trial court. We should do as the Supreme Court of the United States did in Butz and remand the matter to the district court to determine which federal defendants, if any, were "responsible for the decision to initiate or continue a pro-

ceeding subject to agency adjudication" and to grant absolute immunity to those defendants and those only. Butz, 438 U.S. at 523, on remand, 466 F.Supp. 1351 (S.D. N.Y. 1979)(finding that all but two of the defendants were entitled to absolute immunity).

This Court is in no position to determine which federal officials are entitled to absolute immunity on the record before it. The district court has already held that the federal defendants are entitled to qualified immunity only. Thus, we can hardly rely on the court's earlier decision to support a claim for absolute immunity. The district court should be given an opportunity to review the full record and make appropriate findings. Dr. Kwoun is entitled to have an opportunity to submit any additional

evidence that may be relevant and to fully argue his position before the district court.

Lest it be argued that the district court's March 27, 1986, sua sponte order dismissing the complaint against all federal defendants is tantamount to granting absolute immunity, I would point out that the district court does not mention the federal defendants in that order. Moreover, the court discussed the federal defendants in its September 19, 1985, order and held that absolute immunity should not be extended to them under Butz. it is also important to note the district court specifically refused to dismiss Dr. Kwoun's claims under 42 U.S.C. § 1981 and 42 U.S.C. § 1985(3) stating the complaint clearly alleged Dr. Kwoun was denied participation in the

Medicare program because of his race.[1] This is a clear allegation of a constitutional violation that can only be avoided if the district court finds it meritless or specifically finds that each federal defendant is entitled to absolute immunity.

The SEMO Defendants:

Absolute immunity should not be extended to the SEMO defendants for a very simple reason. Congress specifically provided that participants in the

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[1] The record before us does not disclose whether the allegations of racial discrimination are purely conclusory in nature. SEMO's investigation initially focused on Poplar Bluff Hospital which reportedly had the highest readmission rate per 100 discharges of any hospital in its region. It was subsequently narrowed to four doctors, including Dr. Kwoun. As a result of the proceedings, however, neither the hospital nor the other three doctors were sanctioned. This action was reserved for Dr. Kwoun, apparently the only minority doctor in the hospital.

review process were entitled to qualified immunity only. At the time the events in this case took place, 42 U.S.C. § 1320c-6(b)(1), provided:

> (b)(1) No individual who, as a member or employee of any Professional Standards Review Organization or of any Statewide Professional Standards Review Council or who furnishes professional counsel or services to such organization or council, shall be held by reason of the performance by him of any duty, function, or activity authorized or required of Professional Standards Review Organizations or of Statewide Professional Standards Review Councils under this part, to have violated any criminal law, or to be civilly liable under any law, of the United States or of any State (or political subdivision thereof) provided he has exercised due care.
>
> (2) The provisions of paragraph (1) shall not apply with respect to any action taken by an individual if such individual, in taking such action, was motivated by malice toward any person affected by such action.

Id. (as amended October 25, 1977 (emphasis added).

The current statutory section, effective September 3, 1982, provides:

> (b) Employees and fiduciaries of organizations having contracts with Secretary
>
> No person who is employed by, or who has a fiduciary relationship with, any such organization or who furnishes professional services to such organization, shall be held by reason of the performance by him of any duty, function, or activity required or authorized pursuant to this part or to a valid contract entered into under this part, to have violated any criminal law, or to be civilly liable under any law of the United States or of any state (or political subdivision thereof) provided he has exercised due care.

42 U.S.C. § 1320c-6(b) (emphasis added).

It is clear that under either provision, qualified, not absolute, immunity is the standard to be applied to the SEMO defendants. In a case with facts nearly identical to the instant case, a black doctor brought suit against a Professional Standards Review Organization (PSRO), its staff, a hospital, and hospi-

tal officials, alleging discrimination in determining that many of the medical services performed by the doctor for his Medicare and Medicaid patients were unnecessary. With regard to the immunity of the PSRO and its staff, the court stated: "Defendant concedes, and both statutory provisions specify, that PSRO defendants are not immune from liability if they act with malice." Taylor v. Flint Osteopathic Hosp., Inc., 561 F. Supp. 1152, 1160 (E.D. Mich. 1983).[2] Thus, the

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[2] Neither party saw fit to appeal any aspect of Judge Boyle's decision in Taylor. Subsequent to her decision, however, Judge Boyle was appointed to the Michigan state bench and the case was reassigned to Senior Judge George E. Woods. The PSRO and PSRO officials (defendants) again moved for summary judgment, arguing that the doctor's section 1981 claims, remaining after their initial summary judgment motions, should be dismissed because the doctor had failed to establish disparate treatment at the hands of the defendants. Judge Woods granted the defendants'

statute is so clear that the Taylor defendants saw fit to concede and the court to expressly state that the PSRO and PSRO officials were entitled to qualified immunity only.

In this respect, the federal statute follows state statutes which have nearly uniformly codified the common law granting only qualified immunity to peer

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summary judgment motion. On appeal, the Sixth Circuit, in an unpublished opinion, reversed and vacated only Judge Woods' ruling and order, holding that, with respect to the section 1981 claim, issues of fact remained concerning the defendants' justifications for their actions. The Circuit Court thus remanded the case for trial on the merits. Taylor v. Flint Osteopathic Hosp., Inc., No. 84-1206 (6th Cir. May 28, 1985). Thus, Judge Boyle's finding that the PSRO and its officials are entitled to qualified immunity remains in effect and, in the final analysis, Dr. Taylor will receive exactly what Dr. Kwoun should receive -- a trial on the merits of his discrimination claim.

review committees.[3] The reasons for qualified immunity is clear:

> Peer review statutes, which state legislatures have enacted with increasing frequency in recent

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[3] See, e.g., Hayden v. Foryt, 407 So.2d 535, 536 (Miss. 1982), (granting review committee and witnesses before committee qualified immunity); Franco v. District Court of Denver, 641 P.2d 922, 925 (Colo. 1982)(granting review committee and committee members qualified immunity); Buckner v. Lower Florida Keys Hosp. Dist., 403 So.2d 1025, 1028 (Fla. App. 1981)(granting hospital staff and disciplinary body and its agents qualified immunity); Hackenthal v. Weissbein, 154 Cal. Rptr. 423, 426-27 (1979)(granting qualified immunity to witnesses at hearing of peer review committee of nonpublic institution); Matviuw v. Johnson, 388 N.E.2d 795, 799 (Ill. App. 1979)(granting witnesses at hearing of peer review committee qualified immunity), aff'd, 444 N.E.2d 606 (1980); see also Southwick and Slee, Quality Assurance in Health Care, 5 J. Legal Med. 343, 386-96 (1984); D. Gregory, Immunity for Physicians in Peer-Review Committees, 11 Legal Aspects of Med. Practice No. 9, pp. 1, 2-4 (Sept. 1983); J. C. Norman, So-Called Physician "Whistle-Blowers" Protected: Immunity of Peer-Review Committee Members from Suit, 11 Legal Aspects of Med. Practice No. 2, pp. 4-7 (Feb. 1983).

> years, are directed toward the attainment of an elevated quality of health care at a reasonably low cost to the patient. Such legislation is based on the premise that the evaluation of the professional competency of doctors is best left to the specialized expertise of their peers, subject only to limited judicial surveillance. Peer review legislation promotes self-regulatory competence usually by protecting committee members with a qualified immunity and committee proceedings with some degree of confidentiality.

Franco v. District Court of Denver, 611 P.2d 922, 925 (Colo. 1982)(citing, Note, The Legal Liability of Medical Peer Review Participants For Revocation of Hospital Staff Privileges, 28 Drake L. Rev. 692 (1978-79); Note, Medical Peer Review Protection In the Health Care Industry, 52 Temple L.Q. 552 (1979)).

Yet, it does not follow from the importance of and need for candor in peer review proceedings that peer review committees and those testifying before them should be accorded an absolute privilege to testify or render decisions in a racially discriminatory manner. Such conduct, as has been alleged in this

case, advances no important interest of society or the professions and indeed actually hinders competent performance of the important tasks peer review committees are set up to perform. Thus, the conduct to which we may be affording an absolute privilege in this case and to which the majority's decision will most certainly afford an absolute privilege in future cases, has "no place in a forum convened to determine the qualifications of an individual to continue in the practice of his profession." Matviuw v. Johnson, 388 N.E.2d 795, 799 (Ill. App. (1979), aff'd, 444 N.E.2d 606 (Ill. 1980).

To summarize, I would remand this matter to the district court to determine which of the federal defendants performed a function analogous to that of a prose-

cutor, arranged for the presentation of the government's case in the course of the administrative proceeding, or performed adjudicatory functions. Only those defendants should be extended absolute immunity for the alleged unconstitutional acts directed at Dr. Kwoun. I would further direct the district court to extend only qualified immunity to the SEMO defendants for their alleged unconstitutional acts. If Congress wishes to extend absolute immunity to those who participate in the peer-review process in prosecutorial or adjudicative functions, it is free to do so. Until it does, I believe we are bound by the statute as written.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

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No. S81-123 C
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Soung O. Kwoun, M.D.

Plaintiff,

v.

Richard S. Schweiker, etc., et al.,

Defendants.

Filed December 23, 1981

MEMORANDUM

This case is now before this Court on the motion of the defendants to dismiss or in the alternative for summary judgment. Defendants bring this motion pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure and contend that this Court lacks the requisite subject matter jurisdiction

because plaintiff failed to exhaust his administrative remedies. In addition, defendants assert that plaintiff's complaint fails to state a claim upon which relief may be granted because the procedures that the defendants afforded the plaintiff did not fail to comply with due process requirements.

Plaintiff's cause of action arises out of an initial determination by the Health Care Financing Administration (hereinafter HCFA)(which is a branch of the Department of Health and Human Services) to exclude the plaintiff from the medicare reimbursement program. The plaintiff was notified on September 11, 1981 that the agency was suspending his receipt of reimbursement under the Medicare Program pending any administrative appeals pursuant to 42 U.S.C. § 1320c.

Plaintiff is presently reimbursed in excess of $200,000.00 per year for his work at Henrickson Clinic. Upon suspension of his payments, the plaintiff petitioned this Court for a temporary restraining order, alleging that the agency had improperly excluded him from the Medicare Program by not affording him the procedural steps required by the statute and regulations. In response, a temporary restraining order was instituted on September 17, 1981. At this time, this Court believed that the plaintiff would suffer irreparable injury unless injunctive relief was granted and that defendants would not be adversely affected during the period in which the Order was in effect. However, after considering the claims of the plaintiff and defendants and the statutory scheme

it is this Court's conclusion that it lacks the requisite subject matter jurisdiction to consider plaintiff's claim, or to order any relief in this matter.

In order to understand the validity of the plaintiff's claims and the power of this Court to review those claims, it is necessary to examine the statutory scheme and the extent of review that the plaintiff already has received at the agency level. The defendants have charged the plaintiff with violating the sections of the Social Security Act, which requires a provider of medical services to give patients only those services that are medically necessary and also requires a doctor to meet professional standards. 42 U.S.C. § 1320c-9a(A)(B). In order to assure the en-

forcement of these statutory mandates, Congress established Professional Standard Review Organization (hereinafter PSRO), and charged it with the responsibility of determining whether doctors were complying with statutory requirements. 42 U.S.C. § 1320c-1(b)(1)(A). The PSRO is ordinarily composed of a number of local physicians. Congress purposefully provided that a PSRO should be operated by and comprised of physicians in the private sector; it was the intent of the legislature that the members of the PSRO would serve as governmental experts, who were familiar with local conditions and the quality of medical services that doctors rendered in their particular locality. Public Citizen Health Research Group v. Department of Health, Education, and Welfare, No.

79-2364 (D.C. Cir. Oct. 23, 1981). In the event that a PSRO determines that a doctor is providing unnecessary medical services or is not living up to professionally recognized standards, it is their duty to make a report and send that report with comments to the Statewide Professional Review Council. 42 U.S.C. §§ 1320c-11, c-6,c-9(b)(1). Prior to the transmission of this report the alleged violator is given notice of his failure to comply with statutory standards and an opportunity to respond to any accusations. The Review Council then sends a report to the HCFA, which reviews the information and gives the alleged violator notice of its decision and an opportunity to submit "documentary evidence and written argument concerning the proposed action" of the agency. 42

C.F.R. § 474.10(c). In the event that the HCFA determines, after a review of all the evidence, that the exclusion of the doctor from the Medicare Program is appropriate, the reimbursement of benefits will cease thirty days after the agency's decision. The statute and regulations further provide that a provider of health care only will become reeligible to receive benefits if the Secretary decides to reverse the decision of the HCFA, or if a court determines that the final decision of the Secretary is inappropriate. The Social Security Act allows for judicial review of the agency decision only after the Secretary has entered its final order. 42 U.S.C. § 405(g).

It is evident from the documents and exhibits submitted by both plaintiff and

defendants that plaintiff's activities were reviewed pursuant to the statutory scheme required by the Social Security Act. In April of 1979 the Southeast Missouri Foundation for Medical Care (SEMO), a Professional Standards Review Organization (PSRO) in southeast Missouri began to review Poplar Bluff Hospital because of its extremely high re-admission rate. As a result of monitoring the hospital, an in-depth review of Dr. Kwoun's and other doctors' admissions to Poplar Bluff Hospital was made. Due to Dr. Kwoun's alleged failure to cooperate and due to his standard of patient care in February of 1980 SEMO transmitted its report to the Missouri Statewide Professional Standards Review Council. This council then transmitted this report with its comment to the HCFA which recommended

a sanction be imposed. Dr. Kwoun was advised in writing in September of 1980 by the Central Office of HCFA of its intent to exclude his participation under the Social Security Reimbursement Program. The doctor was also notified of his opportunity to contest this determination by writing and personal appearance. On December 5, 1980, Dr. Kwoun took advantage of this opportunity and appeared at the administrative review before the director of HCFA. The evidence adduced at the trial was then submitted to SEMO for further review and recommendation. On September 2, 1981, HCFA advised Dr. Kwoun that he would be excluded from participation in the Medicare Program pursuant to 42 U.S.C. § 1395y(d)(1)(c) for a period of ten years. The letter also notified the doctor of

his right to a hearing before the ALJ. Accompanying the decision was a statement which details the basis for the decision to exclude the plaintiff. The letter states that among the grounds for exclusion are that the doctor failed to meet professionally recognized standards of health care. Specifically, the charges were that the doctor made inappropriate use of pacemakers, laboratory services, drug usage, scheduling of surgery, and use of ancillary services. Finally the agency accused Dr. Kwoun of rendering services inconsistent with the diagnosis of certain patients. Dr. Kwoun is presently appealing this decision in the manner prescribed by the statute.

Plaintiff is requesting this Court to invoke its mandamus jurisdiction pursuant to 28 U.S.C. § 1361 so as to

compel this federal agency to comply with the due process requirements of the Fifth Amendment of the Constitution. In addition, he requests injunctive relief so that he might continue to be reimbursed for his medical services. Plaintiff does not dispute the fact that the procedural steps as described were taken. However, plaintiff alleges that the agency failed to follow its own regulations in violation of the Fifth Amendment in the following manners: first, a report dealing with Poplar Bluff Hospital was converted into a report involving plaintiff and his medical practices; second, plaintiff alleges that he was not given sufficient opportunity to discuss the charges against them with the PSRO, in the letter sent to the doctor in September 1981, the agency alleges that the doctor refused to

meet with the PSRO; third, the Statewide Council and HCFA merely rubber stamped the report of the PSRO; finally, the letter of September 2, 1981 merely referred to a hearing before an ALJ, as opposed to stipulating that plaintiff had a right to review by the Appeals Council. Subsequent to the receipt of this letter plaintiff has appealed the decision of the HCFA, pursuant to the required statutory procedure. However, the plaintiff contends that the failure of the agency to follow its own regulations constitutes a violation of the due process clause of the Fifth Amendment and thereby entitles him to immediate judicial relief.

In response to plaintiff's claims that his constitutional rights were violated and he therefore is entitled to judicial relief, the defendants advance

two arguments. First, defendants contend that the plaintiff has failed to make the requisite showing for preliminary relief. Secondly, the government argues that this Court lacks the requisite subject matter jurisdiction to consider this cause of action pursuant to its mandamus jurisdiction.

Before granting injunctive relief it is the obligation of courts to balance the relative hardships and benefits to the plaintiff and defendant. In a recent case decided by a district court in the Eastern District of New York, the court held that a doctor suspended from the receipts of benefits pursuant to the Social Security Act, was not entitled to a preliminary injunction. Lemlich v. Schweicker, No. 81-2865 (E.D.N.Y. September 16, 1981). The court reasoned

that the potential harm to the public caused by a delay in the exclusion of a doctor who allegedly provided substandard medical care, from the Medicare Program, outweighed the potential harm to plaintiff's medical practice. In addition, the court reasoned that the plaintiff failed to establish a likelihood of success on the merits because he had not exhausted his administrative remedies. Finally, any harm that the plaintiff may suffer during suspension will be alleviated if the plaintiff ultimately prevails because he will receive compensation for those services that he has provided in the interim. However, if the agency and courts sustain the decision to exclude the plaintiff from the Medicare Program, recoupment of reimbursement payment is by no means certain. For

these reasons, further preliminary injunctive relief does not seem appropriate under the circumstances of this case.

The remaining issue for this Court to determine is whether this Court has the necessary jurisdiction to consider plaintiff's claim at this particular time. Section 405(g) of the Social Security Act provides for judicial review of challenges to agency determinations only after the Secretary renders his final decision on the merits.[1] In fact, the statute expressly precludes judicial review of the decision to exclude a

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[1] The statute provides:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow.

physician from the Medicare Program until "after such hearing as is provided in Section 405(g) of the Title". 42 U.S.C. § 1395y(d)(3).

The Supreme Court has held that the "final decision" requirement embodied in the Social Security Act is a statutorily specified jurisdictional prerequisite, and therefore is more than a codification of the judicially developed doctrine of exhaustion. Weinberger v. Salfi, 422 U.S. 749 (1975). However, there is an exception to the rule that requires the plaintiff to exhaust his administrative remedies prior to judicial review. In the event the party seeking judicial review establishes that the agency has violated his constitutional right, a court may intervene prior to the conclusion of the administrative processes.

Nevertheless, to fall within the exception to this rule, a party must present a constitutional claim which is collateral to the substantive claim, making adequate relief unobtainable at a post-termination hearing. Matthews v. Eldridge, 424 U.S. 319 (1975); Weinberger v. Salfi, 422 U.S. 749 (1975). In addition, the mere assertion of a constitutional claim is insufficient; the record must reflect a colorable claim. Kechijan v. Califano, 621 F.2d 1 (1st Cir.1980).

It is the opinion of this Court that plaintiff's cause of action does not fall within the exception to the exhaustion of administrative remedies rule. As stated, the requirement of a "final decision" by the Secretary, embodied in the statute, is central to the requisite grant of subject matter jurisdiction. Weinberger

v. Salfi, supra. Furthermore, it is clear that plaintiff's claim is not collateral to his substantive claim, and that the agency will be capable of correcting any procedural defects in a later evidentiary proceeding. The plaintiff is not questioning the constitutionality of the statute nor is he presenting an issue which is beyond the jurisdictional powers of the Secretary to determine.[2] The plaintiff is only claiming that the agency has failed to follow its own guidelines. Nor is it always the rule

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[2] In Lemlich v. Schweiker, supra, the district court reached the plaintiff's due process claim. However, the issue in that case was whether the constitution required a full evidentiary hearing prior to the suspension of benefits. The court held that a post-evidentiary hearing was adequate. Intervention in Lemlich was appropriate because further agency proceedings would not have resolved the constitutional issue before the court.

that an agency's violations of its own regulations always raise a constitutional question. United States v. Caceres, 440 U.S. 741 (1978); Morton v. Ruiz, 415 U.S. 199 (1971). Therefore this Court will not consider the merits of plaintiff's cause of action.

It is the opinion of this Court that intervention with agency procedures would be premature at this time. It would be inconsistent with the intent of Congress and the statutory scheme to preclude the agency from compiling an evidentiary record, which will allow for adequate judicial review, in the event that becomes necessary. It was evidently the intent of the legislature that this court should benefit from the expertise of the agency and the doctors asked to serve on PSRO.

Accordingly, defendants' motion for summary judgment will be granted, and defendants' motion to dismiss will be denied as moot because this Court has considered matters outside of the pleadings pursuant to Rule 56 of the Federal rules of Civil Procedure. In addition, the Order of this Court dated September 17, 1981, granting injunctive relief shall be vacated and this case shall be dismissed.

/s/
UNITED STATES DISTRICT JUDGE

Dated: December 23, 1981.

UNITED STATES DISTRICT COURT
E.D. MISSOURI
SOUTHEASTERN DIVISION

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No. S84-259C(D)

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Soung O. Kwoun, et al.,

Plaintiffs,

v.

Southeast Missouri Professional Standards Review Organization, et al.,

Defendants.

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Sept. 19, 1985

MEMORANDUM

WANGELIN, District Judge

This matter is before the Court upon six separate motions to dismiss the above-styled action or, in the alternative, for summary judgment. Said motions were brought by defendants Howard,

Nicholson, Kram, and Secretary of Health and Human Services; defendants Southeast Missouri Professional Standards Review Organization (SEMO PSRO) and named physicians (SEMO Doctors); defendant Legaspi and defendant Bregant. Each of the above named defendants incorporate Defendants' Suggestions in Support of Motions of defendant SEMO PSRO and others to dismiss or, in the alternative, for summary judgment filed with this Court January 18, 1985 as argument in support of their individual and collective motions.

FACTUAL BACKGROUND

Plaintiffs' cause of action arises out of an initial determination by the Health Care Financing Administration (hereinafter HCFA), which is a branch of the Department of Health and Human Services, to exclude the plaintiff from the

medicare reimbursement program. The plaintiff was notified on September 11, 1981 that the agency was suspending his receipt of reimbursement under the Medicare Program pending any administrative appeals pursuant to 42 U.S.C. § 1320c.

Plaintiff subsequently filed an action before Administrative Law Judge Francis J. Eyerman. The ALJ exonerated plaintiff Dr. Kwoun from all accusations against him. Plaintiffs filed this action alleging defendants' conduct in the above mentioned proceedings constituted violations of 42 U.S.C. § 1981 (Count I); 42 U.S.C. § 1985(2)(Count II); 42 U.S.C. § 1985(3)(Count III); and the Fifth Amendment (Count IV). Plaintiffs further assert tort claims for malicious prosecution (Count V); intentional infliction of emotional distress (Count VI); and

prima facie tort (Count VII).

In determining the sufficiency of a complaint in the face of a motion to dismiss for failure to state a claim pursuant to Federal Rule 12(b)(6), the accepted rule as articulated by the United States Supreme Court is that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). If, on a motion to dismiss or a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as

provided in Rule 56. Fed. R. Civ. P. 12(c). Under Rule 56,

> [t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Defendants appear to raise challenges under both Rule 12(b)(6) and Rule

56(c), and accordingly, to the extent that the Court will consider matters outside the pleadings on a given claim, the ruling shall be based on Rule 56(c).

A.

Defendants' first ground for dismissal is that the three corporate plaintiffs do not have a cause of action in that the complaint only alleged claims by plaintiff Kwoun not the three corporate plaintiffs. Defendants further assert that because the corporate plaintiffs are not members of a race, they cannot assert a cause of action under 42 U.S.C. §§ 1981 or 1985. Moreover, defendants assert that because no sanctions were brought against the corporate plaintiffs, they have no cause of action for denial of equal protection or due process or a claim for malicious prosecution.

Defendants' motion to dismiss for failure to state a cause of action as to three corporate plaintiffs must be denied. The complaint regarding these three plaintiffs is sufficient since it "... contains allegations from which an inference fairly may be drawn that evidence of material points will be introduced at trial." 5 Wright & Miller, Federal Practice & Procedure, § 1216 at 122-123 (1969). Moreover, corporations may file claims under 42 U.S.C. § 1981 as well as § 1985 and the United States Constitution. Des Vergners v. Seckonk Water District, 601 F.2d 9 (1st Cir. 1979). The relationship between plaintiff Kwoun and each of the corporate plaintiffs is articulated in the Amended Complaint. In each instance, plaintiff Kwoun is either the principal stockholder

or trustee of the plaintiff corporations and the plaintiff corporations are or have provided medical service. Given the possibility of alleged harm to plaintiff Kwoun, this Court finds that there is an inference that the plaintiff corporations in which plaintiff Kwoun was involved were also injured.

Thus, because the corporate plaintiffs may have been damaged by defendants' actions and because corporations are persons for purposes of civil rights and Fifth Amendment claims, the corporate plaintiffs do have a cause of action and defendants' motion to dismiss will be denied.

B.

Next, defendants assert that defendant SEMO doctors should be dismissed because defendant SEMO PSRO is a Missouri

not-for-profit corporation which can be sued in its corporate name and that the inclusion of defendants SEMO doctors is surplusage. This contention also fails.

Corporate officers and directors have personal liability under the federal civil rights acts if they intentionally cause a corporation to infringe on the rights secured by those acts. Tillman v. Wheaton-Haven Recreation Association, 517 F.2d 1141, 1146 (4th Cir. 1975). In Clark v. Universal Builders, Inc., 501 F.2d 324 (1974), the Seventh Circuit found that the concept of separate identify between shareholders, directors, and officers and their corporation is not sacrosanct. It demands even less respect if it becomes clear that the corporation is used as a shield to violate the civil rights of others. Id. at 340 n.23.

Plaintiffs' amended complaint alleges that defendant doctors through defendant SEMO PSRO have abridged plaintiffs' civil rights. As such plaintiffs' amended complaint is sufficient to state a cause of action against both defendant SEMO PSRO and defendant SEMO doctors.

C.

Defendants' next contention is that plaintiffs' claim under 42 U.S.C. §§ 1981, 1985(2), 1985(3), the Fifth Amendment, and their state claims are precluded by the Medicare Act. In support of this contention defendants cite Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981).

In Middlesex County Sewerage Authority the Court determined that when remedial devices provided in a particular

Act are sufficiently comprehensive, they may suffice to demonstrate Congressional intent to preclude the remedy of suits under the civil rights acts. Id. at 20, 101 S.Ct. at 2626.

The scope of the preclusion provision has engendered much litigation and little consensus. It is agreed by all of the circuits that the central target of a Section 405(h) preclusion is "any action envisioning recovery of any claim emanating from" the Medicare Act. Association of American Medical Colleges v. Califano, 569 F.2d 101, 107 (D.C. Cir. 1977).

The holding in Middlesex County Sewerage Authority created a narrow exception to the Supreme Court's 1981 holding in Maine v. Thiboutot, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980) that 42 U.S.C. § 1983 authorizes a cause of

action for violations of federal statutory rights. The court in Middlesex was concerned that administrative procedures contained in particular statutes should not be circumvented. Middlesex, 453 U.S. at 20, 101 S.Ct. at 2626.

Defendants cite V.N.A. of Greater Tift City, Inc. v. Heckler, 711 F.2d 1020 (11th Cir. 1983) for the proposition of the Medicare Acts' exclusivity. While defendants correctly state the principle of V.N.A. of Greater Tift City, Inc., the facts here are distinguishable. In V.N.A. the plaintiffs' claims were seeking recovery on a claim directly related to provisions of the Act and the Court held that plaintiffs were limited to the provisions of the Act when seeking a remedy. Here, however, plaintiffs are alleging separate claims unrelated to the

Act. The only connection between the Act and plaintiffs' claims is that plaintiffs' claims arose during other proceedings under the Act. Plaintiff Kwoun has availed himself of the remedies available under the Act for his claims under the Act. Now plaintiffs are seeking redress for alleged wrongs which arose separate and apart from the Act. Accordingly, defendants' assertion that the Medicare Act precludes plaintiffs' action is unfounded.

D.

Next, defendants seek to dismiss all of plaintiffs' civil rights claims contending that plaintiff Kwoun's attempt to mitigate as reflected in Kwoun v. Schweiker, 528 F.Supp. 1004 (E.D. Mo. 1981) constitutes collateral estoppel.

The Eighth Circuit has continuously held that only a prior final judgment on the merits can have the effect of collateral estoppel. Oldham v. Pritchett, 599 F.2d 274, 276 n.1 (8th Cir. 1979); Poe v. John Deere Co., 695 F.2d 1103, 1105 (8th Cir. 1982). Further, a dismissal without prejudice operates to leave the parties as if no action had been brought at all. Moore v. St. Louis Music Supply, Inc., 539 F.2d 1191, 1194 (8th Cir. 1976).

In Kwoun v. Schweiker, the Court specificly states that it will not consider the merits of plaintiffs' cause of action. 528 F.Supp. 1004 at 1008. Judge Nangle left open the possibility of reaching the merits of plaintiffs' cause of action if the situation arose where such consideration was appropriate. Id. Thus Kwoun v. Schweiker was not a decision on the merits and defendants' claim of collateral estoppel is without merit.

E.

Defendants next contend that because they are members of a PSRO they are government officials and thus subject to a three year statute of limitations. Defendants rely on Smith v. North Louisiana Medical Review Assn., 735 F.2d 168 (5th Cir. 1984). In Smith, the Fifth Circuit found that a PSRO is a federal

entity because it is created by federal statute and performs a critical federal function of monitoring costs of services provided under the Medicare Act. Id. at 173.

However, an entity's status as a federal entity is controlled by Congress's intent in creating the organization. Recent cases have made it clear that any general definition of the term agency can be of only limited utility to a court confronted with one of the myriad organizational arrangements for getting the business of the government done. The unavoidable fact is that each new arrangement must be examined anew and in its own context. Public Citizen Health v. Dept.Health, Ed., Etc., 668 F.2d 537, 542 (D.C. Cir. 1981).

The Report of the Senate Committee on Finance on the Social Security Amendments of 1972, S.Rep. No. 92-1230, 92 Cong., 2nd Sess. (1972) provides a clear summary of Congress's intent as to the status PSRO's should have with respect to government versus private agency.

The committee believes that the review process should be based upon the premise that only physicians are, in general, qualified to judge whether services ordered by other physicians are necessary. The committee is aware of increasing instances of criticism directed at the use of insurance company personnel and government employees in reviewing the medical necessity of services. S.Rep. supra at 256.

The committee has therefore included an amendment, as it did in H.R. 17550,

which authorizes the establishment of independent professional standards review organizations by means of which practicing physicians would assume responsibility for reviewing the appropriateness and quality of the services provided under medicare and medicaid.

The committee's bill provides specifically for the establishment of independent professional standards review organizations formed by organizations representing substantial numbers of practicing physicians in local areas to assume responsibility for the review of service (but not payments) provided through the medicare and medicaid programs. Id. at 257.

It is preferable and appropriate that organizations of professionals undertake review of members of their

profession rather than for government to assume that role. The inquiry of the committee into medicare and medicaid indicates that government is ill equipped to assume adequate utilization review. Indeed, in the committee's opinion, government should not have to review medical determinations unless the medical profession evidences an unwillingness to properly assume the task. Id. at 258.

Priority in designation as a PSRO would be given to organizations established at local levels representing substantial numbers of practicing physicians who are willing and believed capable of progressively assuming responsibility for overall continuing review of institutional and outpatient care and services. Local sponsorship and operation should help engender confidence in the familiar-

ity of the review group with norms of medical practice in the area as well as in their knowledge of available health care resources and facilities. Participation in a PSRO would be voluntary and open to every physician in the area. Id. at 259.

PSRO physicians engaged in the review of the medical necessity for hospital care and justification of need for continued hospital care must be active hospital staff members. The purpose here is to assure that only doctors knowledgeable in the provision and practice of hospital care will review such care. Id. at 260.

It is expected that a PSRO would operate in a manner which conserves and maximizes the productivity of physician review time without unduly imposing on

his principal function, the provision of health care services to his own patients. Id. at 264.

Employees of PSRO would be selected by the organization and would not be government employees. Id. at 266.

This Court finds that these expressions demonstrate the fixed purpose of Congress that PSRO's should be independent medical organizations operated by practicing physicians in the private sector, and not government agencies run by government employees. Public Citizen Health v. Dept. of Health Fed. etc., 668 F.2d 537, 543 (D.C. Cir. 1981). A finding that defendant SEMO PSRO and defendant SEMO doctors make up a governmental agency would be inconsistent with the Congressional purpose.

As such, plaintiffs' claim provides a sound basis for applying the five year statute of limitations contained in MoRS § 516.120. Moreover, the Eighth Circuit has determined that the five year statute of limitations is applicable for actions brought under 42 U.S.C. § 1981. See Drake v. Southwestern Bell Telephone Co., 553 F.2d 1185 (8th Cir. 1977).

> The five-year Missouri statute, § 516-120 Mo. Ann. Stat., however, is applicable because a proceeding under § 1981 represents an action upon a liability implied, subd. 1; or an "action upon a liability created by a statute," subd. 2; or an action for "injury to the person or rights of another, not arising on contract and not herein otherwise enumerated," subd. 4. This Court need not decide which of these subdivisions covers this statutory action but the cases indicate that a § 1981 action properly fits the description of one or more subdivisions of § 516.120.

Id. at 1188.

Additionally, plaintiffs alleged that the complained of actions constitute a continuing course of conduct and did not accrue at a specific isolated date. If plaintiffs' allegations are found to be true, no statute of limitation began to run until the date of the hearing before ALJ Eyerman. As such there is sufficient recent conduct to sustain a cause of action in this matter and defendants' motion to dismiss based upon the statute of limitations will be denied.

F.

Defendants Kram, Nicholson, and Howard assert sovereign immunity and seek to dismiss all claims against them. Defendants contend that they are entitled to absolute immunity because plaintiffs' claims arise from the initiation of

administrative actions of a prosecutorial nature.

The Supreme Court has issued a clear description of the immunities available to federal officials in Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). Without retracing the Supreme Court's steps, it is abundantly clear that federal officials cannot claim immunity if their actions are manifestly beyond their line of duty. Butz, supra at 484-85, 98 S.Ct. at 2899-2900.

In the present case, plaintiffs allege misconduct seemingly beyond the scope of defendants' duty and authority. Plaintiffs cite the ALJ's finding that "the HCFA employees were involved in defendant SEMO PSRO's Sanction Report long before it was any of their business, even before it was issued by defendant

SEMO PSRO and defendant SEMO doctors." This Court finds that reasonable minds could differ as to whether such activity is within defendants' scope of authority. Accordingly, defendants Kram, Nicholson, and Howard will not be dismissed based upon an absolute immunity theory.

G.

Defendants next seek to dismiss plaintiffs' claims under 42 U.S.C. § 1981 contending that plaintiffs have failed to plead a denial of any right protected by the act and have failed to plead detailed factual allegations showing the defendants' actions were racially motivated.

In a civil rights action, pleadings are to be liberally construed. Only when the plaintiff can prove no set of facts that would entitle him to relief is a District Court warranted in granting a

motion to dismiss. Windsor v. Bethesda General Hospital, 523 F.2d 891, 893 (8th Cir. 1975).

Plaintiffs' complaint contends that plaintiff was denied participation in the Medicare program, subjected to abuses in connection with the sanction process and essentially deprived of income because of his race. Among the rights protected by 42 U.S.C. § 1981 are the right to earn a living without regard to one's race, to make contracts for education, to fair use and access to justice, and to participate in public benefits programs. See Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); Johnson v Railway Express Agency, Inc., 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975); Runyon v. McCrary, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976);

Martinez v. Fox Valley Bus Lines, 17 F.Supp. 576 (N.D. Ill. 1936); Pennsylvania v. Local 542, 347 F.Supp. 268 (E.D. Penn. 1972).

In Taylor v. Flint Osteopathic Hospital, Inc., 561 F.Supp. 1152 (E.D. Mich. 1983) the Court denied defendant's motion to dismiss saying:

> ... Plaintiff's complaint appears to state a claim under § 1981 against the PSRO in as much as it alleges, in essence, that the PSRO acted in a discriminatory manner in performing its peer review functions and that PSRO's discriminatory conduct precluded plaintiff from performing his "contracts" with his patients and, ultimately, with FOH.
>
> The PSRO's sole direct challenge to the § 1981 claim is that it is devoid of specific factual allegations that PSRO's treatment of plaintiff differed from their treatment of similarly situated white persons, as required by § 1981. This Court having concluded, however, that the complaint fairly apprises the PSRO of the elements of plaintiffs' claim under § 1981, the motion to dismiss this claim pursuant to F.R.Civ. P. 12(b)(6) is hereby denied.

Id. at 1159-60.

Defendants in this case are in no better position than defendant in Taylor. Plaintiffs have alleged actions taken which if true have deprived plaintiffs of rights protected by 42 U.S.C. § 1981. Further, plaintiff has alleged that the actions were motivated by plaintiff's race. Accordingly, this court finds that plaintiff has stated a cause of action under 42 U.S.C. § 1981.

H.

Defendants next move to dismiss Count II of plaintiffs' complaint alleging a violation of 42 U.S.C. § 1985(2). Section 1985(2) relates to institutions and processes of federal judicial proceedings and conspiracies to obstruct the course of justice in state courts. Kush v. Rutledge, 460 U.S. 719,

103 S.Ct. 1483, 75 L.Ed.2d 413 (1983). Moreover, § 1985(2) expressly requires force, intimidation, or threat against persons holding public office, witnesses, or jurors. Williams v. St. Joseph Hospital, 629 F.2d 448, 451 (7th Cir. 1980).

There are no allegations regarding either federal courts or state courts in plaintiffs' complaint or amended complaint. Further, plaintiffs have not alleged that defendants ever subjected any person to any force, intimidation or threat. Accordingly, this Court will grant defendants' motion to dismiss Count II of plaintiffs' amended complaint.

I.

Defendants further contend that plaintiffs have failed to state a cause of action under 42 U.S.C. § 1985(3) claiming the amended complaint (1) fails

to adequately allege the existence of a conspiracy, (2) fails to allege an invidiously discriminatory animus, and (3) fails to allege the deprivation of a constitutional right protected by § 1985(3).

Under Fed. R. Civ. P. 8, technical niceties of pleading are not required. Rather a short and plain summary of the facts sufficient to give fair notice of the claim asserted is sufficient. Means v. Wilson, 522 F.2d 833, 840 (8th Cir. 1975). In addition, a complaint under 42 U.S.C. § 1985(3) must allege facts to show that intentional or invidious discrimination was the object of the conspiracy. Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971).

In Means v. Wilson, the complaint alleged that the defendant conspired with "private individuals" and two other named individuals to ensure defendant was re-elected. Means v. Wilson, 522 F.2d at 840-41. Upon no more than the above, the Eighth Circuit found that the plaintiff had stated a cause of action under 42 U.S.C. § 1985(3). Id.

In the present case, plaintiffs have alleged that the named defendants "acted individually, together, and with others. ..." Such allegations fairly raises the inference of conspiracy. Following the precedent of Means, supra, the Court finds that plaintiffs' amended complaint, although inartfully drafted, does allege conspiracy sufficiently to state a claim under 42 U.S.C. § 1985(3).

Defendants' contention that the complaint fails to allege a class based animus is also without merit. The amended complaint alleges that plaintiff Kwoun is an Asian-American and that defendants subjected him to treatment different than that reserved for white persons. The amended complaint then enumerates all of plaintiffs' charges of how he was treated. This Court finds the pleadings sufficient to allege a class based animus and thus support a § 1985(3) cause of action.

Defendants' contention that plaintiffs' § 1985(3) claim must fail because it lacks a constitutional predicate is also without merit. Case law supports plaintiffs' contention that 42 U.S.C. § 1981 provides a substantive basis for redress under § 1985(3). In Witten v.

A.H. Smith and Co., 567 F.Supp. 1063 (D.Md. 1983), Judge Miller examined the language of the statute, the general legislative history with regard to the rights for which a remedy is provided by § 1985(3), and the intent of the Forty Second Congress. Judge Miller concluded that 42 U.S.C. § 1981 is a proper substantive basis for a claim of redress under § 1985(3). Id. at 1072. This same position was taken in Miller v. St. Louis Theatrical Co., No. 83-2305C(1)(E.D. Mo. August 1, 1984).

As discussed supra, this Court has determined that plaintiffs have raised a colorable claim under 42 U.S.C. § 1981. Accordingly, defendants' motion to dismiss plaintiffs' § 1985(3) claim will be denied.

J.

Defendants seek to dismiss plaintiffs' Count IV. Plaintiffs agree that defendant SEMO PSRO and defendant SEMO doctors are not federal officials subject to a claim under the Fifth Amendment. Accordingly, plaintiffs' Count IV will be dismissed with respect to defendant SEMO PSRO and defendant SEMO doctors.

Defendants Kram, Nicholson, and Howard challenge plaintiffs' constitutional claims contending that there is no private right of action under the Fifth Amendment because plaintiff Kwoun had an alternate remedy via the administrative review process and that plaintiff has not alleged the deprivation of a constitutionally protected property interest without due process.

The Supreme Court has held that victims of a constitutional violation by a federal officer have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 19 L.Ed.2d 619 (1971). Additionally, plaintiffs are not limited to statutorily created causes of action to the exclusion of a Bivens action if the alternative remedy is not equally effective and intended to operate as a substitute for the action under Bivens. Carlson v. Green, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980).

The "Medicare Act" provides only for reimbursement in connection with care services provided without compensation. It does not provide compensation for

plaintiffs' alleged loss of reputation, emotional distress, lost business, punitive damages, nor an opportunity to be heard before a jury. All of the aforementioned differences between the Medicare Act remedy and a Bivens action are significant and counsel in favor of allowing plaintiffs' claim in Count IV against defendants Kram, Nicholson, and Howard. Carlson v. Green, supra.

Further, plaintiffs have alleged the deprivation of constitutionally protected rights without the benefit of due process.

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a

> purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement of those benefits."

Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). Here plaintiff asserts a property interest in his continued participation in the Medicare Program and to receive reimbursement for his services. Physicians such as plaintiff Kwoun are entitled to participation in the Medicare Program provided they comply with certain conditions and requirements under 42 U.S.C. §§ 1320 and 1395. This Court finds that these conditions and require-

ments are sufficient to secure benefits and to support claims of entitlement to those benefits under the rule in Board of Regents v. Roth, supra.

Plaintiff also alleges deprivation of his interest in his profession and a right to earn a living. These interests have long been recognized as property interests which are protected by due process. Schware v. Board of Bar Examiners, 353 U.S. 232, 238, 77 S.Ct. 752, 755, 1 L.Ed.2d 796 (1957).

Plaintiff also has alleged that he was denied fair access to the procedures normally provided to physicians under the Medicare Act. The Eighth Circuit has previously determined that if a plaintiff can prove defendant interfered with his right to procedural due process, he is entitled to damages that actually re-

sulted, which would include, for example, mental and emotional distress. Bishop v. Tice, 622 F.2d 349, 357 (8th Cir. 1980). Accordingly, this Court finds that plaintiff Kwoun's amended complaint alleges deprivation of the types of property and liberty interests which are necessary to state a claim under the Fifth Amendment.

K.

Defendants seek to dismiss plaintiffs' claim of malicious prosecution contending that neither defendant SEMO PSRO or defendant SEMO doctors commenced a prosecution against defendant Kwoun:

> "The elements of a cause for malicious prosecution are: (1) commencement of prosecution of the proceedings against the present plaintiff; (2) its legal causation by the present defendant; (3) its termination in favor of the present plaintiff; (4) absence of probable cause for such proceedings; (5) the presence of malice therein; (6) damage to

plaintiff by reason thereof."

Palermo v. Cottom, 525 S.W.2d 758, 763 (Mo. App. 1975). Of these six factors defendants complain of only the first:

> A person's acts may be the legal cause of prosecution if instituted at his insistence and request. It is sufficient if his action takes the form of an affidavit on which the case is based, regardless of further participation in the prosecution.... To impose liability there must be affirmative action by way of advice, encouragement, pressure or something similar in the institution, or causing the institution of the prosecution.

Id.

In this case plaintiff has alleged that defendants prepared fraudulent reports and recommended that plaintiff be permanently excluded from participation in Medicare and related programs. Plaintiff further alleges that defendants' recommendations and reports precipitated the institution of the action complained

of. Such allegations are sufficient to survive a motion to dismiss for failure to state a cause of action for which relief can be granted.

L.

Defendants also seek to dismiss plaintiffs' claim for outrageous conduct contending that the conduct alleged in the complaint is not extreme and outrageous as a matter of law.

The Missouri Supreme Court "has accepted the Restatement's view that a right of action does exist for damages for severe emotional distress, intentionally and recklessly caused, by 'extreme and outrageous conduct.'" Pretsky v. Southwestern Bell Telephone Co., 396 S.W.2d 566 (Mo. Sup. 1965); Nelson v. Grice, 411 S.W.2d 117 (Mo. Sup. 1967).

Both of the cited cases quote at length from the Restatement's comment on the type of conduct which will give rise to such liability. Essentially the conduct must have been "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Restatement, § 46 p. 73. Warrem v. Parrish, 436 S.W.2d 670, 673 (Mo. Supp. 1969).

In passing upon the sufficiency of plaintiffs' complaint, the Court must consider the truth of the facts alleged, giving them liberal construction and give plaintiff the benefit of all fair implications from such facts. Matthews v. Pratt, 367 S.W.2d 632,634 (Mo. Supp. 1963).

In the present case plaintiffs allege that defendants willfully issued a sanction report calling for permanent exclusion which contained manufactured and fabricated matters and refused to provide plaintiff Kwoun notice of charges or any opportunity to explain his situation. Plaintiff further alleges that defendants thereafter pursued the matter through the statewide council and HCFA, with notice to the public, deliberately misstating facts, and contriving exhibits in their efforts to further prosecute him. Plaintiff alleges not one act but a continuous course of conduct. If the facts plaintiff alleges are true, reasonable men might well consider defendants' actions of such an extreme and outrageous nature as will render them liable for extreme emotional distress

intentionally caused thereby.

M.

Defendants seek next to dismiss plaintiffs' claim for prima facie tort. The doctrine of prima facie tort, which first appeared in the Restatement, has been adopted by the courts of Missouri, Porter v. Crawford, 611 S.W.2d 265 (Mo. App. 1980). However, as is clearly set out in the Restatement, the doctrine is applicable only when the factual basis of the complaint does not fall within the parameters of an established tort.

Thus, application of the doctrine is not justified here as plaintiff has factually alleged malicious prosecution and outrageous conduct which are torts presently recognized by Missouri courts.

Plaintiffs have cited the case of Lohse v. St. Louis Children's Hospital,

646 S.W.2d 130 (Mo. App. 1983) to support the position that an alternative tort claim does not defeat the prima facie tort claim. The court in Lohse, however, dismissed plaintiff's claim because plaintiff failed to plead any facts to support the claim. The court made no comment as to the appropriateness of a prima facie tort claim pled as a second cause with wrongful discharge. Id. at 130-31.

Accordingly, because plaintiffs have alleged the same set of facts as malicious prosecution and prima facie tort, this Court will dismiss the prima facie tort claim.

N.

Finally, defendants seek summary judgment on all counts:

> Summary judgment is an extreme remedy, one which is not to be

entered unless the movant has established his right to a judgment with such clarity as to leave no room for controversy and that the other party is not entitled to recover under any discerible circumstances.

* * * * *

... the Supreme Court set the standard that should be applied when one party to a lawsuit in federal court makes a motion for a summary judgment:

> Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case 'show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Rule 56(c), Fed. Rules Civ. Proc. This rule authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, ... [and where] no genuine issue remains for trial ... [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.'

Ozark Milling Co. v. Allied Mills, Inc., 480 F.2d 1014, 1015 (8th Cir. 1973);

Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627, 64 S.Ct. 724, 728, 88 L.Ed. 967 (1944).

In the present case plaintiffs have alleged violations of the civil rights statutes, malicious prosecution, conspiracy, and outrageous conduct. Each of these charges are in themselves questions of fact in that their ultimate determination revolves on findings of motivation, intent, good-faith, and subjective feelings. The Eighth Circuit has determined that summary judgment is notoriously inappropriate for a determination of claims on which the issue of intent, good-faith, or other subjective feelings played dominate roles. McGee v. Hester, 724 F.2d 89, 91 (8th Cir. 1984). In this instance this Court finds summary judgment inappropriate due to the inherently

factual nature of plaintffs' claims and the belief that reasonable minds could differ as to defendants' culpability for their alleged actions.

Accordingly, defendants' motions will be granted in part and denied in part.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

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No. S84-259 C(D)

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Soung O. Kwoun, et al.,

Plaintiffs,

v.

Southeast Missouri Professional Standards Review Organization, et al.,

Defendants.

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Filed March 27, 1986

MEMORANDUM

This matter is before the Court ua sponte.

FACTUAL BACKGROUND

Plaintiffs brought this action as a result of an initial determination by the Health Care Financing Administration (HCFA), which excluded plaintiffs from

the Medicare reimbursement program. This decision was made pursuant to the recommendations and efforts of the defendants. Plaintiffs subsequently filed an action before an Administrative Law Judge pursuant to the appeals provisions of 42 U.S.C. § 1320(c). The ALJ reversed the HCFA decision and reinstated plaintiffs to the reimbursement program. Kwoun v. Southeast Mo. Pro. Standards Review Org., 622 F.Supp. 520, 523 (E.D. Mo. 1985). Plaintiff then filed the instant action alleging various civil rights and tort violations. However, all of plaintiffs' allegations may be categorized as an action for malicious prosecution which resulted in various alleged constitutional deprivations.[1]

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[1] For a complete recital of plaintiffs' allegations see Kwoun v. Southeast Mo. Pro. Standards Review Org.,

The Court on its own motion now considers the question of whether defendants are entitled to any immunity from actions, such as the above-styled matter, due to their congressional mandate to conduct intensive reviews of government funded health services. For the reasons set forth below, the Court finds that defendants are entitled to immunity and, thus, this action must be dismissed.

History and Evolution of PSROs

The health care delivery system in the United States is the first industry to be comprehensively regulated since the 1930s. Health expenditures continue to escalate out of proportion to the rest of the economy. As long ago as 1976, 42.2%

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supra at 523.

of the nations health expenditures came from public funds. Gibson & Mueller, National Health Expenditures, Fiscal Year 1976, Soc. Sec. Bull. 3, 4. Publicity generated by instances of fraud and other abuse in government funded health programs focused attention on both the dubious quality and the unnecessary quantity of the health care delivered in this country. Miller, PSRO Data and Information: Disclosure to State Health Regulatory Agencies, 57 Boston U.L. Rev. 245, 246 (1977).

When it established Medicare and Medicaid in 1965, Congress recognized the need to curb practitioner and provider induced demand in order to contain the cost of government funded medical services. Id. To this end payments under these programs are limited to medically

necessary health care services. 42 U.S.C. § 1395(f)(7); § 1396. Congress required each hospital to organize a committee of physicians to evaluate the necessity of health care provided therein. See 42 U.S.C. § 1395X(e)(6); 45 C.F.R. §§ 250. 18, .19 (1975). Those internal review activities, however, were nothing more than token lip service and could be aptly characterized as more form than substance. S. Rep. No. 1230, 92nd Cong., 2nd Sess. 255 (1972). Congress needed to put teeth into the requirement that federally financed health care be medically necessary. In order to promote effective, efficient, and economical delivery of Medicare and Medicaid, Congress enacted the PSRO Amendment to the Social Security Act. Act of Oct. 30, 1972, Pub. L. No. 92-603, tit. II, 249F(b), 86 Stat.

1429 (modified at 42 U.S.C. § 1320c, et seq. (Sup. II, 1972), as amended, (Supp. V, 1975). Thus, the PSRO Amendment was adopted in response to recognition that the original review system incorporated into the Medicare Program failed to control the costs of government sponsored medical care.

This legislation established a system of external monitoring of institutionally based health care services which Congress intended would be free from the conflicts of interest inherent in the old in-house review methods. PSROs are to determine (1) whether particular institutionally based services are medically necessary, (2) whether they are of acceptable quality, and (3) whether appropriate care could effectively be provided on an outpatient basis or more

economically in an inpatient facility of a different type. 42 U.S.C. § 1320c-4(a)(1). The PSRO is also provided with various enforcement sanctions. Among these sanctions is the recommendation that the practitioner or provider be prohibited from participation in the reimbursement programs. 42 U.S.C. §1320c-9(b)(1) (Supp. II, 1972).

Sanctions are appropriate whenever a practitioner or provider has "grossly and flagrantly" violated the statute or has failed to comply with his statutory obligations in a substantial number of cases. Id. In the instant case, defendants found that plaintiffs had violated the statute to such an extent as to warrant imposition of sanctions. The HCFA agreed and plaintiffs were excluded from participation in the Medicare and

Medicaid reimbursement programs.

Immunity of PSROs

Congress did not specifically provide PSROs with immunity from legal actions such as that in the instant matter. However, a careful review of the legislative history of the PSRO Amendment clearly indicates that some form of immunity is both necessary and desirable.

In formulating the present PSRO Amendment, Congress was convinced that the old utilization review system was simply not adequate; in fact, the old system was characteristically ineffective. It was fragmented, retrospective, and incomplete. Numerous witnesses who testified before the Senate Subcommittee stated that a significant proportion of the health services provided under Medicare and Medicaid were in excess of those

which would be found medically necessary, and the old system failed to prevent this from happening. 117 Cong. Rec. 21266 (6/11/71).

The key to making a PSRO work effectively is the degree of motivation and sincerity of the physicians and medical organization in each area. 117 Cong. Record 21267 (6/22/71). The stakes are too high and public concern and scrutiny too great for anyone to delude himself that a pro forma PSRO will be acceptable. Id. Substance and not form must be the test of a PSRO. Performance and professionalism will be the criteria of judgment.

From the foregoing, it is abundantly clear that Congress expected that PSROs would conduct active, comprehensive, and probing reviews even if such reviews are

not popular with the providers under investigation. Without such an intent, Congress would have left the weak and ineffective rubber stamping method in place.

In the instant case, defendants conducted a review just as Congress anticipated all PSROs should. At the completion of this review, defendants recommended that plaintiffs be excluded from the various government reimbursement programs. HCFA agreed with defendants' recommendation and issued an order to that effect.

Plaintiffs took advantage of the appeals process as provided by the statute. 42 U.S.C. § 1320(c). In this instance, the appeals process worked in plaintiffs' favor and the HCFA ruling was reversed. Thus, to this point in the

proceedings, the review process functioned just as Congress anticipated it should.

However, plaintiffs then brought the instant action. This action has thrown Congress's well-intentioned and carefully constructed plan into chaos. How can a PSRO be expected to conduct extensive reviews if by doing so it becomes the target of a lawsuit such as the above-styled matter? Quite obviously it cannot. The instigation of lawsuits such as this will have a chilling effect upon the vigor with which these reviews will be undertaken. This was simply not Congress' intent.

Immunity has consistently been provided for groups and individuals who, by legal mandate, are charged with undertaking unpopular tasks.

The most recent example is articulated in Malley, et al. v. Briggs, et al., ___ U.S. ___ (slip opinion) (3/5/86). In Malley the Supreme Court ruled that police officers who believed that the facts stated in an affidavit are true and submits them to a neutral magistrate may be entitled to immunity under the objective reasonableness standard of Harlow v. Fitzgerald, 457 U.S. 800 (1982).

Under this ruling officers cannot avoid liability under the rule of qualified immunity on the grounds that the act of applying for an arrest warrant is per se objectively reasonable where the officer believes that the facts alleged in his affidavit are true, and that he is entitled to rely on the judicial officer's judgment in issuing

the warrant and hence finding that probable cause exists. The question is whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant. If such was the case, the application for the warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest.

In the instant case, the same type of immunity should be afforded. Defendants, like the officer in Malley, investigated a situation and presented their findings to a neutral party for a determination on their recommendation. As in Malley where the magistrate issued the requested warrants, the Director of HCFA acted favorably on defendants'

recommendation. Subsequently, plaintiffs obtained a reversal through the appeals process just as in Malley, the grand jury refused to indict, and charges were dropped. The question then becomes whether defendants herein knew or should have known that their recommendation was improper. If this question is answered in the negative then defendants are immune from liability under the immunity theory articulated in Malley. In Malley the court determined that only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable will the shield of immunity be lost. Malley, et al. v. Briggs, supra, slip op. p. 9.

Here, if defendants' recommendations were so lacking in factual basis that

defendants could not have believed them to be proper, plaintiffs' action should stand. However, after careful consideration of all pleadings and supporting documents, the Court finds that defendants conducted their review just as Congress intended. Further, defendants' recommendations were made with objective belief that plaintiffs should be excluded from the reimbursement programs based upon the facts uncovered in defendants' investigation. Thus, defendants should be shielded from liability pursuant to the Supreme Court's ruling in Malley.

As the foregoing clearly indicates, Congress has determined that comprehensive review of government funded health care is in the public interest. Yet Congress did not specifically provide immunity to encourage PSROs to vigorously

pursue their appointed tasks. The Court will correct Congress' oversight with its ruling today. Plaintiffs and those similarly situated must not be allowed to use the Court system to gain revenge for actions which Congress ordered PSROs to undertake. Accordingly, this Court will enter an Order dismissing plaintiffs' complaint based upon defendants' inherently necessary immunity.

Dated this 27th day of March, 1986.

s/s
H. Kenneth Wangelin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

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No. S 84-259 C(D)

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Soung O. Kwoun, et al.,

Plaintiffs,

v.

Southeast Missouri Professional Standards Review Organization, et al.,

Defendants.

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Filed June 3, 1986

MEMORANDUM AND ORDER

The matter is before the court upon plaintiffs' motion to alter or amend judgment and to clarify judgment.

On March 2, 1986, this Court dismissed the above styled matter. First, plaintiffs are concerned in their motion for clarification as to whether

the Court intended to dismiss all defendants. The Court understands that plaintiffs are concerned that this Court may not have jurisdiction over defendants Kram, Nicholson, and Howard. To that end the Court considers its March 27, 1986 order to overrule its September 19, 1985 order denying said defendants' motions to dismiss. Thus, the Court has, by its March 27, 1986 order, dismissed all defendants.

Next, plaintiffs move this Court to alter or amend its March 27, 1986 order. The basis for plaintffs' motion is plaintiffs' perception that the Court overlooked or ignored the provisions of 42 U.S.C. § 1320(c)-6. While this Court's March 27, 1986 order does not mention 42 U.S.C. § 1320(c)-6, the Court did consider said section. This section

provides support for the Court's contention that Congress intended to provide immunity. The section does not provide guidelines as to how the immunity is to be applied under any given set of circumstances. It is clear, however, that the type of immunity that this Court found controlling in its March 27, 1986 order is compatible with the type of immunity Congress attempted to provide in 42 U.S.C. § 132(c)-6. Therefore, this Court's determination that defendants are protected by a qualified immunity based upon a standard of objective reasonableness shall not be altered.

Accordingly,

IT IS HEREBY ORDERED that plaintiffs' motion to alter or amend this Court's March 27, 1986 order be and is DENIED; and

IT IS FURTHER ORDERED that plaintiffs' motion to clarify this Court's March 27, 1986 order be and is DENIED.

Dated this 3rd day of June, 1986.

s/s
H. Kenneth Wangelin
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

No. S84-259 C(D)

Soung O. Kwoun, et al.,

Plaintiffs,

v.

Southeast Missouri Professional Standards Review Organization, et al.,

Defendants.

ORDER

In accordance with the Memorandum filed this date and incorporated herein,

IT IS HEREBY ORDERED that the above-styled matter be and is DISMISSED.

Dated this 27th day of March, 1986.

s/s
H. Kenneth Wangelin
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

==========

No. 85-2379

==========

Soung O. Kwoun, et al.,

Appellees,

v.

Southeast Missouri Professional Standards Review Organization, et al.,

Appellants.

==========

Nos. 86-1502/1838

==========

Soung O. Kwoun, et al.,

Appellants,

v.

Southeast Missouri Professional Standards Review Organization, et al.,

Appellees.

Appeals from the United States District Court for the Eastern District of Missouri

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JUDGMENT

These appeals from the United States District Court were submitted on the record of the said district court, briefs of the parties and were argued by counsel.

Upon consideration of the premises, it is hereby ordered and adjudged that the judgment of the district court is affirmed in accordance with the opinion of this Court.

February 4, 1987

Order entered in accordance with opinion.

s/s
Clerk, U.S. Court of Appeals, 8th Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 85-2379EM

==========

Soung O. Kwoun, et al.,

Appellees,

v.

Southeast Missouri Professional
Standards Review Organization, et al.,

Appellants.

==========

No. 86-1502/1838EM

==========

Soung O. Kwoun, et al.,

Appellants,

v.

Southeast Missouri Professional
Standards Review Organization, et al.,

Appellees.

Appeals from the United States District Court for the Eastern District of Missouri

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ORDER

Petition for rehearing en banc of Soung O. Kwoun, et al., has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

March 9, 1987

Order entered at the Direction of the Court:

s/s
Clerk, U.S. Court of Appeals
Eighth Circuit.

Constitutional Provision Involved

This case involves the Fifth Amendment to the Constitution of the United States which provides, in pertinent part:

> No person shall ... be deprived of life, liberty, or property, without due process of law....

STATUTES INVOLVED

42 U.S.C. § 1320c-5.

> (a) Each Professional Standards Review Organization shall apply professionally developed norms of care, diagnosis, and treatment based upon typical patterns of practice in its regions (including typical lengths-of-stay for institutional care by age and diagnosis) as principal points of evaluation and review. The National Professional Standards Review Council and the Secretary shall provide such technical assistance to the organization as will be helpful in utilizing and applying such norms of care, diagnosis, and treatment. Where the actual norms of care, diagnosis, and treatment in a Professional Standards Review Organization area are significantly different from professionally developed regional norms of care, diagnosis, and treatment approved for comparable conditions,

the Professional Standards Review Organization concerned shall be so informed, and in the event that appropriate consultation and discussion indicate reasonable basis for usage of other norms in the area concerned, the Professional Standards Review Organization may apply such norms in such area as are approved by the National Professional Standards Review Council.

. . .

(c)(2) Each review organization, agency, or person referred to in paragraph (1) shall utilize the norms developed under this section as a principal point of evaluation and review for determining, with respect to any health care services which have been or are proposed to be provided, whether such care and services are consistent with the criteria specified in section 1320c-4(a)(1) of this title.

42 U.S.C. § 1320c-6.

. . .

(b) No person who is employed by, or who has a fiduciary relationship with, any such organization or who furnishes professional services to such organizations, shall be held by reason of the performance by him of any duty, function, or activity required or authorized pursuant to this part ~~or to~~ a valid contract

entered into under this part, to have violated any criminal law, or to be civilly liable under any law of the United States or of any State (or political subdivision thereof) provided he has exercised due care.

. . .

Aug. 14, 1935, c. 531, Title XI, § 1157, as added Sept. 3, 1982, Pub.L. 97-248, Title I, § 143, 96 Stat. 389.)

42 U.S.C. § 1320c-8.

(a) Any beneficiary or recipient who is entitled to benefits under this chapter (other than subchapter V) or a provider or practitioner who is dissatisfied with a determination with respect to a claim made by a Professional Standards Review Organization in carrying out its responsibilities for the review of professional activities in accordance with paragraphs (1) and (2) of section 1320c-4(a) of this title shall, after being notified of such determination, be entitled to a reconsideration thereof by the Professional Standards Review Organization and, where the Professional Standards Review Organization reaffirms such determination in a State which has established a Statewide Professional Standards Review Council, and where the matter in controversy is $100 or more, such determination shall be reviewed by professional members of such Council

and, if the Council so determined, revised.

(b) Where the determination of the Statewide Professional Standards Review Council is adverse to the beneficiary or recipient (or, in the absence of such Council in a State and where the matter in controversy is $100 or more), such beneficiary or recipient shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title, and, where the amount in controversy is $1,000 or more, to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title. The Secretary will render a decision only after appropriate professional consultation on the matter.

(c) Any review or appeals provided under this section shall be in lieu of any review, hearing, or appeal under this chapter with respect to the same issue.

42 U.S.C. § 1320c-9.

. . .

(b)(1) If after reasonable notice and opportunity for discussion with the practitioner or provider concerned, any Professional Standards Review Organization submits a report and recommendations to

the Secretary pursuant to section 1320c-6 of this title (which report and recommendations shall be submitted through the Statewide Professional Standards Review Council, if such council has been established, which shall promptly transmit such report and recommendations together with any additional comments and recommendations thereon as it deems appropriate) and if the Secretary determines that such practitioner or provider, in providing health care services over which such organization has review responsibility and for which payment (in whole or in part) may be made under this chapter has--

> (A) by failing, in a substantial number of cases, substantially to comply with any obligation imposed on him under subsection (a) of this section, or
>
> (B) by grossly and flagrantly violating any such obligation in one or more instances,

demonstrated an unwillingness or a lack of ability substantially to comply with such obligations, he (in addition to any other sanction provided under law) may exclude (permanently for such period as the Secretary may prescribe) such practitioner or provider from eligibility to provide such services on a reimbursable basis.

(2) A determination made by the Secretary under this subsection shall be effective at such time and upon such reasonable notice to the public and to the person furnishing the services involved as may be specified in regulations. Such determination shall be effective with respect to services furnished to an individual on or after the effective date of such determination (except that in the case of institutional health care services such determination shall be effective in the manner provided in subchapter XVIII of this chapter with respect to terminations of provider agreements), and shall remain in effect until the Secretary finds and gives reasonable notice to the public that the basis for such determination has been removed and that there is reasonable assurance that it will not recur.

(3) In lieu of the sanction authorized by paragraph (1), the Secretary may require that (as a condition to the continued eligibility of such practitioner or provider to provide such health care services on a reimbursable basis) such practitioner or provider pay to the United States, in case such acts or conduct involved the provision or ordering by such practitioner or provider of health care services which were medically improper or unnecessary, an amount not in excess of the actual or estimated cost of

the medically improper or unnecessary services so provided, or (if less) $5,000. Such amount may be deducted from any sums owing by the United States (or any instrumentality thereof) to the person from whom such amount is claimed.

(4) Any person furnishing services described in paragraph (1) who is dissatisfied with a determination made by the Secretary under this subsection shall be entitled to reasonable notice and opportunity for a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title, and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title.

42 U.S.C. § 1320c-16.

. . .

(b)(1) No individual who, as a member or employee of any Professional Standards Review Organization or of any Statewide Professional Standards Review Council or who furnishes professional counsel or services to such organization or council, shall be held by reason of the performance by him or any duty, function, or activity authorized or required of Professional Standards Review Organizations or of Statewide Professional Standards Review Councils under this part, to have vio-

lated any criminal law, or to be civilly liable under any law, of the United States or of any State (or political subdivision thereof) provided he has exercised due care.

(2) The provisions of paragraph (1) shall not apply with respect to any action taken by any individual if such individual, in taking such action, was motivated by malice toward any person affected by such action.

. . .

As amended Oct. 25, 1977, Pub.L. 95-142, § 5(i) (n), 91 Stat. 1190, 1191.

42 U.S.C. § 1981:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(R. S. § 1977.)

42 U.S.C. § 1985(3):

> (3) If two or more persons in any State or Territory conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; ... in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

R.S. § 1980.

REGULATIONS INVOLVED

42 C.F.R. § 474.3 PSRO responsibilities.

(a) The PSRO shall identify situations that may result in a violation of the obligations specified in § 474.1 and help to prevent their occurrence as provided in § 474.4.

(b) The PSRO shall determine when a violation of an obligation has occurred and report the matter, with recommendations for action, to the Statewide Council of, if there is no Council, to HCFA.

(c) The PSRO shall use the authority or influence it may prossess and enlist the support of other professional or government agencies, including the State Medicaid Agency, to ensure that each practitioner and provider complies with the obligation of § 474.1.

42 C.F.R. § 474.4 Action on potential violation.

If a PSRO identifies a situation that may result in a violation, it shall send the practitioner or provider a written notice containing the following information:

(a) The obligation involved;

(b) The situation, circumstances, or activity which, if continued, may result in a violation;

(c) The authority and responsibility of the PSRO to report a violation of obligations;

(d) At the discretion of the PSRO, a suggested method for correcting the situation and a time period for corrective action by the practitioner or provider;

(e) The sanction that the PSRO could recommend if a violation occurs; and

(f) An invitation to discuss the problem with representatives of the PSRO.

42 C.F.R. § 474.5 Factors in PSRO determination of a violation.

If the PSRO identifies a violation, it shall determine:

(a) Which obligation specified in § 474.1 has been violated; and

(b) Whether the practitioner or provider has:

(1) Failed to comply substantially with an obligation in a significant number of cases; or

REGULATIONS INVOLVED

42 C.F.R. § 474.3 PSRO responsibilities.

(a) The PSRO shall identify situations that may result in a violation of the obligations specified in § 474.1 and help to prevent their occurrence as provided in § 474.4.

(b) The PSRO shall determine when a violation of an obligation has occurred and report the matter, with recommendations for action, to the Statewide Council of, if there is no Council, to HCFA.

(c) The PSRO shall use the authority or influence it may prossess and enlist the support of other professional or government agencies, including the State Medicaid Agency, to ensure that each practitioner and provider complies with the obligation of § 474.1.

42 C.F.R. § 474.4 Action on potential violation.

If a PSRO identifies a situation that may result in a violation, it shall send the practitioner or provider a written notice containing the following information:

(a) The obligation involved;

(2) The obligation violated;

(3) The basis for the determination;

(4) The sanction to be recommended; and

(5) The right of the practitioner or provider to submit to the PSRO, within 20 days of the date on the notice, additional information or written request for a meeting with the PSRO to review and discuss the determination, or both.

(b) Review of determination.

(1) The PSRO may, on the basis of additional information submitted by the practitioner or provider, affirm, modify, or reverse its determination or the sanction to be recommended; and

(2) The PSRO shall promptly give written notice to the practitioner or provider of any action it takes as result of the additional information received.

42 C.F.R. § 474.8 PSRO report to the Statewide Council or to HCFA.

(a) Manner of reporting. If the PSRO determines that a violation has occurred, it shall submit a report to the Statewide Council or, if there is no council, directly to HCFA.

(b) Content of the report. The PSRO report shall include:

(1) Identification of the practitioner or provider and in the case of a provider, the name of its director, administrator, or owner;

(2) The type of health care service involved;

(3) A statement of facts describing each failure to comply with an obligation, with specific dates, places, circumstances, and any other relevant information;

(4) Pertinent documentary evidence;

(5) Copies of written correspondence and written summaries of oral exchanges with the practitioner or provider regarding the violation;

(6) The PSRO's determination that the practitioner or provider has violated an obligation under the Act; and

(7) The PSRO's recommendation of the sanction, if any, and the basis for that recommendation.

42 C.F.R. § 474.9 Role and functions of the Statewide Council.

(a) Council review and comment. The Council shall:

(1) Review the report submitted by the PSRO to assure that it is complete and complies with all requirements set forth in § 474.8(b); and

(2) Prepare a statement concurring or nonconcurring with the PSRO's recommended action and identifying any areas in which the PSRO report is incomplete.

(b) Transmittal to HCFA. The Council shall promptly transmit to HCFA the PSRO report and its statement of concurrence or nonconcurrence with any additional comments or recommendations.

42 C.F.R. § 474.10 Action by HCFA on receipt of the report.

(a) Determination of violation. HCFA will review the PSRO report and determine (on the basis of the factors specified in § 474.5) whether a violation has occurred.

(b) Determination of sanction. If HCFA concludes that there is a violation, it will determine whether to impose a sanction after considering:

(1) The recommendation of the PSRO and the Statewide Council;

(2) The type of offense;

(3) The severity of the offense;

(4) The anticipated deterrent effect of the sanction;

(5) The previous sanction record of the practitioner or provider;

(6) Availability of alternative sources of services in the community; and

(7) Any other matters relevant to the particular case.

(c) Notice of proposed sanction. (1) If HCFA proposes to impose a sanction in accordance with §472.2 (or to terminate a provider agreement in accordance with § 405. 614(a)(5)), it will send the provider or practitioner written notice of its intent and the reasons for the proposed sanction.

(2) Within 15 days of the date on the notice, the provider or practitioner may submit documentary evidence and written argument concerning the proposed action.

(3) For good cause shown by the provider or practitioner, HCFA may extend the 15-day period.

(d) Notice to provider or practitioner and the State Medicaid and Title VI agencies. (1) If, after exhaustion of the procedures

specified in paragraph (c) of this section, HCFA decides to impose a sanction, it will notify the provider or practitioner and the State Medicaid and Title V agencies of the adverse determination and of the sanction to be imposed at least 30 days before the effective date of the sanction.

(2) The notice will specify:

(i) The basis for the determination;

(ii) The sanction to be imposed;

(iii) The effective date and, if appropriate, the duration of the exclusion;

(iv) The appeal rights of the practitioner or provider; and

(v) In the case of exclusion, the earliest date on which HCFA will accept a request for reinstatement.

(e) Public Notice. HCFA will publish notice in a newspaper of general circulation in the PSRO area. The notice will identify the sanctioned provider or practitioner; the obligation in § 474.1 which has been violated; specify the sanction imposed and, if the sanction is exclusion, the effective date and duration.

(f) Notice to other affected entities. HCFA will give notice, as appropriate, to:

(1) The PSRO that originated the sanction report and the Statewide Council involved;

(2) PSROs in adjacent areas;

(3) State Medicaid fraud control units, and State licensing bodies;

(4) Hospitals, skilled nursing facilities, home health agencies, and health maintenance organizations (HMO's);

(5) Medical societies and other professional organizations; and

(6) Medicare carriers and intermediaries, health care prepayment plans, and other affected agencies and organizations.

(g) Effect of HCFA determination.

(1) A practitioner or provider dissatisfied with a HCFA determination is entitled to a hearing and review by the appeals council in accordance with §§ 405.1531 through 405.1595 of this chapter.

(2) The HCFA determination will continue in effect unless revised by a hearing decision.

PROGRAM MANUAL

The Department of Health, Education and Welfare recognizes that PSROs operate as independent, private, nonprofit corporations. However, included in each PSRO's activities is the performance, under contract with HCFA, of a statutory and regulatory function supported by Federal funds, as noted above.